83 - 1447

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
Petitioner,

v.

NORA C. BELL,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

ROBERT J. MARTIN, JR.
Counsel of Record
800 Peachtree-Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30043
(404) 659-6700

WILLIAM B. HAIRSTON, JR.
7th Floor, Watts Building
Birmingham, Alabama 35203
(205) 328-4691

Counsel for Petitioner

QUESTIONS PRESENTED

1. Is it error in an employment discrimination case to place the burden of persuasion on defendant to prove that it is not guilty of intentional discrimination where plaintiff's *prima facie* case includes anecdotal evidence which the trial court credited, so that defendant cannot rebut plaintiff's *prima facie* case by explaining what happened, or giving a reason for what it did?

2. Is it error for an appellate court to give greater weight to a factual finding than that given by the trial court and thereby reverse the trial court's ultimate finding about defendant's intent in an employment discrimination case?

PARTIES

Birmingham Linen Service is operated by National Service Industries, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting a Writ	7
Conclusion	18
Appendix A (Judgment of the Eleventh Circuit Court of Appeals)	A1
Appendix B (Opinion of the Eleventh Circuit Court of Appeals)	B1
Appendix C (Denial of Petition for Rehearing *En Banc* by the Eleventh Circuit Court of Appeals)	C1
Appendix D (Findings of Fact and Conclusions of Law Entered by the United States District Court for the Northern District of Alabama)	D1
Appendix E (Oral Opinion Rendered by the Trial Court T. 453-55)	E1

TABLE OF AUTHORITIES

CASES

	Page
Board of Trustees v. Sweeney, 439 U.S. 24 (1978)	7, 10
Commissioner v. Duberstein, 363 U.S. 278 (1960)	13
Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982)	12
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983)	10
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	7, 10
Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983)	12
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)	13
Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1982)	8
Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983)	17
Lincoln v. Board of Regents of Univ. System, 697 F.2d 928 (11th Cir. 1983)	10
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)	8, 9, 10
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)	6, 8, 9, 10, 11, 12
Montgomery v. Yellow Freight System, Inc., 671 F.2d 412 (10th Cir. 1982)	11, 12
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	8
Perryman v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983)	11

Pullman-Standard, Division of Pullman, Inc. v. Swint, 456 U.S. 273 (1982) 12, 15, 17
Rasimas v. Michigan Department of Mental Health, 714 F.2d 614 (6th Cir. 1983) 11
Robino v. Norton, 682 F.2d 192 (8th Cir. 1983) 17
Rodgers v. Lodge, 458 U.S. 613 (1982) 12
Terrell v. United States Pipe & Foundry Co., 696 F.2d 1132 (11th Cir. 1983) 17
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1982) 7, 9, 10, 11
Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983) 17
U.S. Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478 (1983) 8, 10, 12
United States v. Yellow Cab Co., 338 U.S. 338 (1949) 13
Watson v. National Linen Service, 686 F.2d 877 (11th Cir. 1983) 18
Wells v. Gotfredson Motor Co., 709 F.2d 493 (8th Cir. 1983) 11
Wheeler v. City of Columbus, 686 F.2d 1144 (5th Cir. 1982) 11
White v. Washington Public Power Supply System, 692 F.2d 1286 (9th Cir. 1982) ... 11

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 621 12

42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) 2, 3, 8, 10, 11, 17, 18

42 U.S.C. § 2000e-2(a)(2) (Section 703(a)(2) of the Civil Rights Act of 1964) 2

42 U.S.C. § 2000e-5(g) (Section 706(g) of the Civil Rights Act of 1964) 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52(a) 3, 7, 12, 13, 17

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
Petitioner,

v.

NORA C. BELL,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Petitioner, Birmingham Linen Service, prays that this Court issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 715 F.2d 1552. The denial of the petition for rehearing *en banc* and the Findings of Fact and Conclusions of Law entered by the United States District Court for the Northern District of Alabama are unreported. All are reproduced in the appendix.

JURISDICTION

The United States Eleventh Circuit Court of Appeals entered judgment on September 30, 1983 and denied a petition for rehearing *en banc* on December 5, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981), provides in part:

> Sec. 703 (a) It shall be an unlawful employment practice for an employer—
>
> * * *
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex ....
>
> * * *
>
> Sec. 706 (g) ... No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was sus-

pended or discharged for any reason other than discrimination on account of ... sex ....

Federal Rule of Civil Procedure 52(a) provides in part:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 .... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

Respondent, Nora C. Bell, contended that petitioner, Birmingham Linen Service, denied her a promotion to a washroom position at its industrial laundry because of her sex and instituted this suit under Title VII of the 1964 Civil Rights Act in the United States District Court for the Northern District of Alabama.

Facts

Pursuant to a collective bargaining agreement, petitioner posted a job bid for a washroom job entitled "extra washman" on July 12, 1977. Four employees signed the posting indicating interest in filling the job. Production superintendent Gus Westbrook bypassed respondent, Nora C. Bell, a female employed in the laundry department, and John Oliver, a male employed in the receiving department, and awarded the

job to a less senior male employee, Waddell Mason. Mason was already working in the washroom, running an extractor, operating one small washing machine and occasionally substituting for the washer, who operated a bank of eight large washers. Respondent and her shop steward complained to Westbrook because respondent, the senior bidder, did not receive the job. Westbrook told them that Waddell Mason would be continued in the washroom position because he was qualified for the position, knew the job and did not require any training. Respondent and her shop steward then complained to the plant manager, who reversed Westbrook's decision and agreed to place her in the washroom position.

On August 8, 1977, respondent suited out in a washroom uniform and boots and reported to the washroom. Westbrook approached her and offered her an apron. She refused the apron, refused to perform any washroom work and returned to her job in the laundry. She contended that the job she bid upon did not require loading or unloading washing machines and only persons involved in the loading and unloading process (pulling and loading) wore aprons. The trial court found that in a conference between Westbrook, the respondent and the shop steward, Westbrook said "that he would not put Nora Bell in the washroom because if he did every woman in the plant would want to go in the washroom" or a statement similar in substance.

Respondent filed a grievance under the collective bargaining agreement which was submitted to arbitration. The arbitrator found that the petitioner had violated the agreement because the agreement did not list a position entitled "extra washman." He held that the

company could not combine the job of extractor operator with the washing position and that the job should have been posted as a trainee position.

In April, 1978, petitioner posted a job of "washman trainee" pursuant to the arbitrator's award which stated that the trainee would have to "pull and load as necessary." Waddell Mason was the only employee who bid on the position. At the time of trial, September, 1981, Mason continued to work in the washroom running an extractor, pulling and loading, operating one small washing machine and occasionally substituting for the washer operating the bank of eight large washing machines. The same person who occupied the washer position operating the eight large washers when respondent was placed in the washroom in August, 1977 continued in that position.

Trial

The factual contentions of the parties at trial were diametrically opposed. Respondent contended that she was originally not placed in the washroom position because of her sex; that the duties of the posted position were to operate the eight large washers on a full time basis and that the tender of the apron was cause for her to believe that she would be pulling and loading, a duty imposed on her because of her sex. She contended that the company did not post the trainee position in April, 1978.

The court found that respondent proved a *prima facie* case. The court considered an EEOC determination and the arbitration decision and specifically found that Westbrook made the anecdotal statement. The trial

court credited the petitioner's factual contentions: that the initial posting was intended to clear up Mason's pay rate and that Westbrook followed through on this intention by giving the job to Mason rather respondent; that the posted job was to substitute for the washer when the washer was absent, part of the job that Mason was actually performing; that all the employees who knew the washing position learned it while pulling and loading; that Mason and, on occasion, the washer, pulled and loaded; and that the trainee position was posted in April, 1978. The court found that requiring the trainee to pull and load followed through on petitioner's original intent relating to the content of the position. The court stated that it "must still determine if plaintiff has established by a preponderance of the evidence that she has been a victim of intentional discrimination." At this point the court had heard all of the evidence of the parties. It held that the petitioner's articulated reasons were not pretextual. It further held that respondent did not carry her burden of proving that petitioner's treatment of respondent was because of her sex.

Appellate Findings

The Eleventh Circuit held that because the trial court credited the anecdotal evidence it committed error in applying the burden of proof standard articulated in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Without holding that the ultimate finding of the trial court was clearly erroneous, the Eleventh Circuit rejected the finding that respondent had not been the victim of intentional discrimination. The Eleventh Circuit held that respondent "proved" the ultimate issue of discrimination by the Westbrook

comment alone. Therefore, petitioner could not meet respondent's case by articulating a reason for its actions. Instead, petitioner has a heavy burden of persuasion to prove by a preponderance of the evidence that the bias of the person making the anecdotal statement had no relationship to the employment decision or that the same decision would have been made absent the illegal factor. The Eleventh Circuit reviewed the facts of the case, gave different weight to evidence considered by the trial court and remanded the case with detailed instructions as to the relevance and weight to be given to evidence previously considered by the trial court.

The decision of the Eleventh Circuit Court of Appeals contravenes decisions of this Court and other Circuit Courts of Appeals by placing the full burden of persuasion upon a defendant in an employment discrimination case. It further contravenes Rule 52(a) by substituting the appellate court's views for those of the trial court which heard, weighed and determined the relevancy of the evidence presented.

REASONS FOR GRANTING A WRIT

1. The Decision Below Incorrectly Places the Burden of Persuasion on a Title VII Defendant Contrary to the Decisions of This Court and Other Circuits

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1982), this Court explained that a Title VII defendant does not have a burden of

persuasion but only a burden of going forward under the ruling of *McDonnell-Douglas Corp. v. Green*, 411 U.S. at 802. The plaintiff's burden of proving a *prima facie* case, which shifts the burden of going forward with an explanation to the defendant, may be met by the use of circumstantial evidence, direct evidence or a combination of the two. *U.S. Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1481 n.3 (1983). Where the trial court has heard all the evidence of the parties it is to go directly to the issue of whether the defendant has intentionally discriminated against the plaintiff. At this stage of the case the plaintiff continues to have the burden of persuasion, which focuses on the defendant's explanation of what happened or reasons for doing what it did. The court must decide which explanation of the employer's motivation it believes, *Aikens*, 103 S.Ct. at 1482, and plaintiff retains the burden of proving that "but for" her sex the defendant would not have treated her as it did. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976).

In this case the Eleventh Circuit rejected this Court's burden of proof rules developed in Title VII cases and instead applied the standards of proof used when a governmental entity must justify its actions which have been proved to violate basic constitutional rights of its citizens or employees. *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Lee v. Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982). By rejecting the Title VII standard and imposing a standard used in cases where there is a history of intentional discrimination, such as maintaining segregated school districts, the Eleventh Circuit Court of Appeals has radically changed the established order in the trial of disparate treatment cases.

The effect of the *Bell* opinion is to establish a presumption so strong that an employer cannot meet it by an explanation of what occurred or why the action that the employee complains of was taken. An employer is presumed to have acted with an illegal motive where the trial court credits any of plaintiff's direct evidence—anecdotal, opinion or otherwise—which seeks to prove that the employer was more likely than not motivated by an illegal purpose. To meet the presumption thus established, the employer must assume that the treatment of the employee was motivated by bias. The circumstances surrounding the incident therefore have little relevance, and the employer must prove that the incident would have occurred without the bias or that the generally pervasive bias present in the workplace was put aside with respect to the alleged discriminatory treatment.

The focus of the evidence in individual discriminatory treatment cases will no longer be on the alleged discriminatory incident and the motivation of the employer but on seeking to establish a presumption that the employer's actions more likely follow a generally discriminatory pattern. The result is at odds with *McDonnell-Douglas* and its progeny, which seek to increase the focus on the alleged discriminatory action in a disparate treatment case and the motive of the employer in taking the action. The result in this case is also directly contrary to *McDonald v. Santa Fe Trail Transportation Co.*, which places on plaintiff the burden of proving that the defendant's illegal motive would have led it to take the same action regardless of the explanation for its behavior.

The result in this case reinstates the pre-*Burdine* rule in the Eleventh Circuit that a defendant must

prove its actions to be non-discriminatory by a preponderance of the evidence. This burden will be imposed where the trial court ultimately credits some of plaintiff's evidence which seeks to prove that a discriminatory intent more likely motivated defendant than any other reason. Besides flying in the face of *Furnco, Sweeney, Burdine* and *Aikens*, the holding will be difficult in application. Defendant's burden—whether that of articulating a reason or that of persuading the court by a preponderance of the evidence—will only be known after the court's final ruling on the evidence. This will cause great uncertainty in Title VII proceedings where any type of direct evidence is present, such as anecdotal statements or actions, general reputation or opinion evidence, causing the trial court to have to decide as a preliminary matter if it credits the plaintiff's evidence. Defendant will not know what its burden will be until such a finding is made.

This case also conflicts with other employment discrimination cases decided by the Eleventh Circuit Court of Appeals where plaintiff has relied upon anecdotal evidence to directly prove a discriminatory intent motivated defendant. In *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 938, 943 (11th Cir. 1983), *reh'g denied*, 705 F.2d 471, *cert. denied*, 104 S.Ct. 97, the court applied the *McDonnell-Douglas* and *Burdine* analysis and further applied *McDonald v. Santa Fe Trail Transportation Co.*, putting a "but for" burden of persuasion on plaintiff despite evidence of statements suggesting racial animus. In *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 618-19, 625 (11th Cir. 1983), *amended*, 714 F.2d 1066, the court applied the *McDonnell-Douglas* and *Burdine* analysis and standard of proof to a case based on statistical

and anecdotal evidence. *But see Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1143 (11th Cir. 1983) (suggesting in dicta that the burden of persuasion shifts to the defendant upon the proof of discriminatory intent by direct evidence). Given the diverse decisions within the Eleventh Circuit Court of Appeals in the application of burden of proof standards in Title VII cases, it would be appropriate for this Court to exercise its supervisory jurisdiction to resolve the conflicts.

More importantly, placing the burden of persuasion on a defendant in an employment discrimination case conflicts with rulings in other circuits which in similar situations continue to place the burden of proof on plaintiff in conformity with the opinions of this Court. For examples of decisions applying the *McDonnell-Douglas* analysis to Title VII cases despite the presence of direct evidence, see *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 618, 623 n.11 (6th Cir. 1983), where female supervisors called the male plaintiff a "male chauvinist" and told him that "[t]he girls are out to get you"; *Wells v. Gotfredson Motor Co.*, 709 F.2d 493, 495 (8th Cir. 1983), where the female plaintiff was told by defendant's sales manager that a man could better handle a sales position because of the physical labor required in the job; *White v. Washington Public Power Supply System*, 692 F.2d 1286, 1289 (9th Cir. 1982), where a rejected female was told that she was passed over for a promotion because her supervisor wanted to promote a male to "break up a female ghetto"; *Wheeler v. City of Columbus*, 686 F.2d 1144, 1153-54 (5th Cir. 1982), *later appeal*, 703 F.2d 853 (5th Cir. 1983), where the female plaintiff was told that the job for which she applied was not one for a woman; *Montgomery v. Yellow*

Freight System, Inc., 671 F.2d 412, 413 (10th Cir. 1982), where one of defendant's supervisors made a racist remark. For similar decisions in lawsuits brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1976 & Supp. V 1981), see *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 78 (2d Cir. 1983); *Cuddy v. Carmen*, 694 F.2d 853, 855 (D.C. Cir. 1982).

This Court itself has applied the *McDonnell-Douglas* analysis where anecdotal evidence was present. *Aikens*, 103 S.Ct. at 1481 n.2. A writ should be granted to resolve the conflicting decisions of the Eleventh Circuit Court of Appeals among its panels and the other circuit courts and make them conform to the law as expressed by this Court.

2. The Decision Below Conflicts With Decisions of This Court and Other Circuits Prohibiting an Appellate Court From Setting Aside Factual Findings Made By a Trial Court Without Finding Them Clearly Erroneous

In *Pullman-Standard, Division of Pullman, Inc. v. Swint*, 456 U.S. 273 (1982), this Court held that trial court findings which focus on the intent of a party in an employment discrimination case are pure questions of fact entitled to deference under FRCP Rule 52(a). This Court in *Swint*, 456 U.S. at 287, and in *Rodgers v. Lodge*, 458 U.S. 613, 622-23 (1982), *reh'g denied*, 103 S.Ct. 198, made clear that the 52(a) standard applies to both subsidiary and ultimate findings of fact and rejected the rule allowing appellate review of ultimate findings where the subsidiary findings are not

clearly erroneous. Appellate courts must defer to the unique opportunity afforded the trial court to judge the credibility of the witnesses and weight of the evidence. Appellate courts may not reject the findings of the trial court if they disagree with the weight given to the evidence. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-56 (1982). The 52(a) clearly erroneous rule likewise applies to factual inferences drawn from undisputed basic facts. *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). In *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949), where one party contended that the finding of the trial court was factually in error and requested that new, contrary findings be made by appellate courts, this Court stated:

> Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them .... The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.
>
> ... [T]he Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'

After two days of trial and thirteen witnesses the trial court accepted the petitioner's explanation of the course of events and the petitioner's explanation of its

motivation. It found that the posting was made in an attempt to clear up Mason's status after changes in washroom equipment changed his duties. It found petitioner's explanation for the initial rejection of respondent and a senior male bidder was creditable. It found that Westbrook's rejection of respondent was not motivated by her sex. The trial court clearly considered and weighed the anecdotal evidence since it made the finding and referred to it in the opinion.

The trial court found that the action of giving respondent an apron when she was to start her training in the washroom was consistent with the production superintendent's original intent about the duties of the job and petitioner's prior practices. It rejected the respondent's contentions that the position was a full time washing job or that the job should be double staffed to train her. Finally, it found that the position was properly reposted, as a trainee posting, as ordered by the arbitrator, and that the requirement that the trainee pull and load was consistent with petitioner's original intent, Mason's present job duties, petitioner's on-the-job procedures and its usual practices.

Here, the respondent, dissatisfied with the result obtained in the trial court, proceeded to reargue the facts of her case on appeal. In most cases involving the determination of the state of mind of an individual or determining the motivation for the actions of a party, inferential judgments will necessarily be made by the finder of fact. The inferential judgment draws from the total experience of the fact finder at the trial of the case. Many observations are made of the circumstances of the parties, the matter of their testimony, the interaction of the parties and the local and industrial setting in which the circumstances occur. From

this total experience a trial court reaches a conclusion as to what motivated the persons involved to have set the series of events in action. Every nuance observed can influence the ultimate determination.

The final determination could differ among fact finders, depending upon the actions of the witnesses, the fact finder's perception of the evidence, the setting and the parties. This Court has indicated that an appellate court which has only a written record before it is to defer to and respect the total experience of the trial judge. The perceptions of an appellate court are likely to be different from a reading of the record only. They do not see the demeanor of the witnesses, hear the tone of their voice or see their reaction to questioning. The record lacks a complete sphere of experience which can influence the court's determination.

The Eleventh Circuit did not find the trial court's findings clearly erroneous under the *Swint* rule. Instead it emphasized the trial court's finding that the production superintendent made an anecdotal or gender-based remark and characterized it as "highly probative evidence of illegal discrimination." Appendix at B14. It decreed that petitioner abandoned the production manager's position that Mason should have the job because of his qualifications once petitioner's plant manager agreed to put respondent in the posted position. *Id.* at B15. It also decided that Westbrook's intent to make official Mason's de facto occupancy of the position was irrelevant. *Id.* The court stated the factual question in this case as what was the production superintendent's "intent *at the time* he imposed the pulling and loading functions on Bell." *Id.* (emphasis in original). Since the trial court found that Westbrook made a gender-based statement or "a similar state-

ment in substance" the appellate court decreed that respondent met her ultimate burden of proof and an articulation by the petitioner was not sufficient to meet her case. On remand it placed a "heavy burden of persuasion" on petitioner to prove that the production superintendent's sexual bias (as found by the appellate panel) had no bearing on the decision to give respondent the apron which caused her to walk out of the washroom. *Id.* To do this, petitioner must prove that changes in washroom equipment occurred before the posting which caused petitioner to need only one person washing. *Id.* at B17. It further instructed the trial court to consider and weigh heavily four paper issues in making its decision. *Id.* at B18.

The appellate court in this case reversed the ultimate finding of the trial court, without a clearly erroneous finding, by giving different weight to one piece of evidence, a statement made by a management representative, a fact found, considered and weighed by the trial court. It vacated the factual findings made based upon hearing the testimony of thirteen witnesses as to whether petitioner's treatment of respondent was different because of her sex. It directed the trial court to give greater weight to paper issues, i.e., the position that the arbitrator and the EEOC stated that the petitioner took before them, statistical data, whether petitioner's actions were contrary to its collective bargaining agreement and whether the petitioner has objective employment standards, all matters noted and weighed in the trial court's opinion. The court held that what actually occurred to prompt the "extra washman" posting, the reason for not awarding Ms. Bell the job and whether she had reason to refuse to be trained in the usual fashion were all irrelevant. The appellate court instructed the trial court to base its

final decision on whether washroom changes occurred prior to July 12, 1977, thereby reducing the petitioner's needs to one washer, a fact actually credited by the trial court as part of petitioner's articulation.

The review of the subsidiary findings of the trial court, the reversal of its ultimate finding, the close scrutiny and analysis of the record resulting in detailed instructions to the trial court are a review of the factual findings of the trial court under the guise of what legally constitutes "highly probative evidence" of illegal discrimination. As long as the Eleventh Circuit continues to review factual determinations where it has a different view on the weight and relevance of the evidence, contrary to *Swint*, the clearly erroneous rule will have no effect in employment discrimination cases arising within its jurisdiction. Every litigant who argues about the weight and inferences given by a trial court to the *facts* of a case will be encouraged to seek a second appellate review and analysis of the facts. This approach places the Eleventh Circuit in conflict with other circuits whose decisions have applied FRCP 52(a) to a district court finding of discrimination *vel non* in Title VII cases. *See, e.g., Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983), *on reconsideration*, 722 F.2d 209 (5th Cir. 1984), *cert. denied*, 52 U.S.L.W. 3534 (affirming a judgment for the employer based on findings of no discrimination); *Trout v. Lehman*, 702 F.2d 1094 (D.C. Cir. 1983) (affirming a judgment for two individual plaintiffs based on findings of discrimination); *Robino v. Norton*, 682 F.2d 192 (8th Cir. 1983) (affirming a judgment for the employer after defining the single issue to be "whether the findings of fact adopted by the district court are clearly erroneous"). *But see Terrell v. United States Pipe & Foundry Co.*, 696 F.2d 1132, 1134 (11th Cir. 1983) (remand-

ing to the district court without a clearly erroneous finding and directing it to consider several enumerated items of evidence "as indication of intentional discrimination"). The Eleventh Circuit likewise interprets the "clearly erroneous" standard in Title VII cases to mean that it would have reached a different result and will redefine the facts and remand for further findings by the trial court consistent with appellate findings. *See, e.g., Watson v. National Linen Service*, 686 F.2d 877 (11th Cir. 1983).

A writ should be granted so that this Court can decide the function of the appellate court in reviewing the relevance and weight to be given to factual determinations made by the trial court. It would also give the Court the opportunity to give substance to what is a "clearly erroneous" finding made by a trial court so that standards of review in the various circuits will be the same.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

ROBERT J. MARTIN, JR.
ELARBEE, THOMPSON & TRAPNELL
800 Peachtree-Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30043

Counsel of Record

WILLIAM B. HAIRSTON, JR.
ENGEL, HAIRSTON, MOSES
and JOHANSON, P. A.
7th Floor, Watts Building
Birmingham, Alabama 35203

Counsel for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
PETITIONER,

v.

NORA C. BELL, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7849

D.C. Docket No. 80-0237

NORA C. BELL,
Plaintiff-Appellant,

versus

BIRMINGHAM LINEN SERVICE, ETC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

Before TJOFLAT, HILL, and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be and the same is hereby VACATED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

September 30, 1983

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
PETITIONER,

v.

NORA C. BELL, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7849

NORA C. BELL,
Plaintiff-Appellant,

versus

BIRMINGHAM LINEN SERVICE, ETC.,
Defendant-Appellee.

United States Court of Appeals, Eleventh Circuit.

Sept. 30, 1983.

Female employee brought sex discrimination in employment action alleging that employer declined to promote her, or constructively demoted her, because she was a woman. The United States District Court for the Northern District of Alabama, Robert B. Propst, J., entered judgment for employer, and woman appealed. The Circuit Court, Tjoflat, Circuit Judge, held that: (1) once woman introduced direct evidence of discrimination, employer could not rebut that evidence by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action, and (2) employer was required to establish that employer deci-

sionmaker's sexual bias had no relation whatsoever to its employment decision, or that it would have made same decision in absence of any illegal factor.

Reversed and remanded.

1. Civil Rights ⇐44(1)

Where employment discrimination plaintiff presented direct evidence of employee's intent to discriminate, employer could not meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action.

2. Civil Rights ⇐43, 44(5)

Where employer's decisionmaker specifically stated he would not allow woman into washroom because if she were allowed in, all women would want to enter, employer had burden of persuasion that decisionmaker's sexual bias had no relation whatsoever to his employment decision or employer was required to establish by preponderance of the evidence that it would have made same decision in absence of any illegal factor. Civil Rights Act of 1964, §§ 701 et seq., 701-718, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e to 2000e-17.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, HILL and JOHNSON, Circuit Judges.

TJOFLAT, Circuit Judge:

Nora Bell brought this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2000e-17 (1976 & Supp. V 1981) alleging that Birmingham Linen Service declined to promote her, or "constructively demoted" her, because she was a woman. Following a non-jury trial, the district court concluded that Ms. Bell had failed to carry her burden of proving by a preponderance of the evidence that she was the victim of gender discrimination. The district court erred in applying the relevant legal principles; we therefore vacate the judgment and remanded the case for additional factual findings under the correct legal standards.

I.

Birmingham Linen Service (BLS) operates an industrial laundry in Birmingham, Alabama. Nora Bell works as a presser in that laundry, and has worked for BLS some 23 years. Local 218 of the Laundry, Dry Cleaning, and Dye House Workers Union represents BLS' employees. A collective bargaining agreement between Local 218 and BLS governs the terms and conditions of employment of BLS' workers.

Article 18 of that agreement provides for a posting and bidding procedure to fill job vacancies within the collective bargaining unit. Under Article 18, both immediate job openings and trainee positions must be posted on the employee bulletin board for three working days so that bargaining unit employees may bid for them. Assignments to these jobs and training positions must be made from the bidding. A job will not be con-

sidered to be open, however, if a trainee has bid on the job previously and is willing to accept the new assignment. Thus, receipt of a trainee position is a stepping-stone to filling a position that subsequently comes open.

We are hampered in our exposition of the events forming the background of this dispute because the district court failed to make findings concerning many of the basic, subsidiary facts which are unclear or disputed in the record. In March or April of 1977, Richard Day retired from his position as "washman" in BLS' washroom department.[1] On July 12, 1977, BLS' production manager, Gus Westbrook, posted a bid for an "extra washman" position.[2] Westbrook took down the bid sheet on July 18, 1977. Four persons bid on the position: Nora Bell and three males, including Waddell Mason. Ms. Bell was the most senior employee who bid on the job. Westbrook awarded the position to Waddell Mason.

Bell complained to her union representative, Georgia Robinson, that she should have been awarded the extra washman position. Bell and Robinson went to see Westbrook to determine why Bell had not received the position. Westbrook apparently told them that Mason was more qualified. Bell and Robinson then

---

[1] It is undisputed that all washroom employees, including washmen, are men, and that no female has been employed in the washroom in over 30 years. It is also undisputed that washroom positions are among the highest paid positions in BLS' plant.

[2] "Extra washman" is not a job listed in the collective bargaining agreement. The positions listed there are "washman" and "washman-trainee." Westbrook testified that the "extra washman" label for the job opening was a mistake, and that the posting should have read "washman-trainee."

met with plant manager Charles Jones on Friday, August 5, and complained that the job should have been awarded to Bell, the most senior bidder. After that meeting, BLS awarded the position to Ms. Bell. She was told to report to the washroom on Monday, August 8.

When Bell arrived in the washroom on August 8, Westbrook apparently told her that she would be performing "pulling" and "loading" functions.[3] Bell replied that the pulling and loading tasks were not part of the washman position upon which she had bid. Westbrook then offered Bell the apron that pullers wear to keep their clothing dry, and Bell refused to take the apron. Bell left the washroom to see plant manager Jones, who apparently told her to return to the washroom and talk with Westbrook.

Accompanied by union steward Robinson, Bell then met with Westbrook. Westbrook apparently told them that he gave Waddell Mason the job because he had experience in the washroom. He also stated, according to the testimony of both Bell and Robinson, that he would not put Nora Bell in the washroom because if he did, "every woman in the plant would want to go into the washroom." The district court, deciding the credibility of the evidence, specifically found that Westbrook made this statement, or a similar statement in substance, to Bell and Robinson.

---

[3] As the terms imply, these functions involve loading linen into, and pulling linen out of, washing machines. Apparently, it is physically strenuous work and not an ordinary part of the "washman" function. Washmen sort the linen according to the type involved, determine the nature and degree of the soil, and then decide which formula and which chemicals should be used to clean the linen.

Bell then left the washroom, and returned to her job as a presser. She left work that day, August 8, 1977, and filed both a grievance with her union and a charge of gender discrimination with the Equal Employment Opportunity Commission (EEOC). She filed a second, amended charge with the EEOC on September 13, 1978, alleging that Westbrook harassed and intimidated her in retaliation for filing the earlier charge.

Pursuant to Article 27 of the collective bargaining agreement, the dispute went to arbitration. The arbitrator, in his decision of March 7, 1978, found that previous bid awards had been made according to seniority, not qualifications. He also found that Bell possessed sufficient qualifications, under the contract, to have been awarded the job and been trained for it. The arbitrator found that she met all specified criteria for the job. He decided that BLS had violated the contract in two ways. First, it created a "changed" job, that of an extra washman, by combining the duties of a "hydraulic and tumbler operator" (also called an "extractor operator" in the plant) and of a washman, without notifying the union and discussing the change. (This finding pertains to BLS' effort to impose the pulling and loading tasks on Bell.) Second, the arbitrator determined that BLS, either wittingly or unwittingly, violated the contractual proscription against gender discrimination by refusing to award Bell the job because of her sex. The arbitrator ordered that the extra washman position be abolished and that washroom vacancies be awarded on the basis of seniority. He also awarded Bell back pay for the difference between her current hourly rate and the washman rate. Bell received $631.29 pursuant to this award, covering the period from August 16, 1977, to March 17, 1978.

BLS defended in the EEOC proceeding by contending that Bell was denied the vacant extra washman position because she was less qualified than Waddell Mason, the male initially selected for the position. Bell also contended that she was offered the "puller" job previously held by Mason. The EEOC made its determination on November 30, 1978. It found reasonable cause to believe Bell'a allegation that she was denied the extra washman position because of her sex.[4]

The EEOC based its determination on a number of underlying findings. First, seniority had been the governing factor prior to the Bell incident. Second, no female had ever been assigned to the washroom. Third, the job BLS offered Bell as a puller was dissimilar to the extra-washman job she had been denied. The EEOC also cited the evidence indicating Westbrook's sexual bias, and the arbitrator's determination that gender was a factor in BLS' decision. Finally, the EEOC rejected Bell's charges of retaliatory harassment and discrimination stemming from her earlier charge of discrimination filed with it.

Bell originally brought this action as a class suit on behalf of a putative class of women who are employed, were employed, or were wrongfully rejected for employment by BLS. In an amended complaint filed March 26, 1980, she alleged that BLS maintained a pattern and practice of gender discrimination in hir-

---

[4] We have held that such a finding by the EEOC is admissible evidence and is "highly probative of the ultimate issue involved in such [Title VII] cases." *Smith v. Universal Serv., Inc.*, 454 F.2d 154, 157 (5th Cir.1972). *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

ing, initial job assignments, promotions, transfers, wages and other terms and conditions of employment. Bell also reiterated her individual claims of discriminatory nonpromotion and retaliation. Bell also complained that she was denied equal pay for work of equal value. The complaint alleged violations of Title VII and of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970).

In narrowing the issues for trial, the district court ruled that all the allegations of discrimination except the failure-to-promote and retaliation claims were beyond the scope both of the actual EEOC investigation and of what the EEOC reasonably could have been expected to investigate based upon the original charge filed with it. The court therefore granted BLS summary judgment as to all allegations in Bell's complaint except those pertaining to its promotion practices. Bell does not challenge this ruling on appeal. The court also granted BLS' motion to deny the suit class action status since Bell filed no response to the motion and no other material in support of her class claims.

After a two-day trial, the district court found that Bell did make out a prima facie case as to her promotion, or constructive demotion, claim under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The court found that a vacancy existed, that she applied for it, that she was capable of being qualified for the job with reasonable training, and that the job was later filled by a male. The court further found that it was not necessary for a person to "pull and load" to train for the washman position, and that pulling and loading had not previously been a criterion for obtaining the job of washman.

Applying *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the court stated that a burden of production shifted to BLS to articulate a legitimate, nondiscriminatory reason for its refusal to place Bell in the washman position or its placing increased burdens on the job after Bell applied for the position. The court summarized BLS' position as being that Mason the male who ultimately received the job, was already qualified for the job and had effectively been filling it. The court thus found that BLS satisfied its burden of production. The district court reasoned that BLS had rebutted the presumption of discrimination created by Bell's prima facie case; Bell therefore had to show that BLS' proffered reasons were mere pretext without substance, a task that merged with her ultimate burden of persuading the court she was the victim of intentional discrimination.

The court made additional findings, including, inter alia, that Westbrook had made the aforementioned sexist statement, that no female employee had worked in the washroom in over thirty years, and that it was not necessary to learn pulling and loading to be a washman. Citing *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir. Unit A 1981),[5] the court concluded:

---

[5] *Rohde*, although apparently decided after *Texas Dep't of Community Affairs v. Burdine*, adverts neither to *Burdine* nor *Burdine's* clarification of a Title VII defendant's burden of rebuttal. *Burdine*, and our subsequent cases interpreting *Burdine*, largely undermine *Rohde's* discussion of this issue. *Compare Rohde*, 649 F.2d at 322-23 *with, e.g., Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir.1983) *and Lincoln v. Board of Regents of the Univ. Sys.*, 697 F.2d 928, 937 (11th Cir.1983), *peti-*

> [T]he real issue in this case, notwithstanding any comments made by Westbrook or the findings of the EEOC or the arbitration decision, is whether [BLS'] deliberate effort to place Mason in the position was motivated by matters relating to sex *or* whether this effort was motivated by Mason's prior experience and ability to perform the job without further training.

Record, vol. 1, at 92 (emphasis added).

The court found that the initial reason for posting the "extra washman" position on July 12, 1977, was to add a proper title to a position that Mason already occupied de facto, due to his incumbency in the washroom. Although this may have breached the collective bargaining agreement, the court concluded it did not reflect an intent to discriminate. It found that BLS' original intent was that the "extra washman" would perform other duties such as pulling and/or loading. The district court thus implicitly rejected its earlier suggestion that the pulling and loading requirements were placed on Bell to discourage her from taking the job. The court's ultimate conclusion was that the intent behind the whole procedure was to leave Mason in his same position but to change his job title. The complications that arose from the bid of a more senior employee, Bell, for the job related to possible violations of the collective bargaining agreement and not the civil rights laws. Concluding that Bell was not the victim of intentional discrimination, the district court entered judgment for BLS.

---

tion for cert. filed, 51 U.S.L.W. 3904 (U.S. June 14, 1983) (No. 82-2050).

II.

The basic analytical framework governing claims of disparate treatment and/or disparate impact under Title VII has been set forth in numerous opinions of this court, and we decline to fill the pages of the Federal Reporter by once again trodding that well-worn path.[6] This is a disparate treatment claim. The Supreme Court has set forth the elements of a prima facie disparate treatment claim, and the mechanics of burden-shifting once such a claim has been established, in *McDonnell Douglas v. Green*, as clarified in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), and, most importantly, *Texas Department of Community Affairs v. Burdine*.

The Supreme Court, and this court, have stressed time and again that the four-part *McDonnell Douglas* test for establishing a prima facie case of disparate treatment is not intended to be a Procrustean bed within which all disparate treatment cases must be forced to lie. The Court in *McDonnell Douglas*, recognizing the wide variety of circumstances from which disparate treatment claims might arise, took pains to point out that its specification of the prima facie proof required of a Title VII plaintiff "is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13. The *Furnco* court reiterated that "[t]he method suggested in *McDonnell Douglas* for pursuing this inquiry [whether disparate treatment oc-

---

[6] Recent and thorough expositions of those fundamental principles may be found in, e.g., *Eastland v. TVA*, 704 F.2d 613 (11th Cir. 1983), and *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769 (11th Cir. 1982).

curred] . . . was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577, 98 S.Ct. at 2949.

The *McDonnell Douglas* method of establishing a prima facie case addresses two evidentiary problems common to most Title VII cases: (1) direct evidence of discriminatory intent will most likely be nonexistent or difficult to prove; and (2) the employer enjoys greater access to proof of its reasons for its own employment decisions. *See Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979). *McDonnell Douglas* therefore allows the plaintiff to shift a burden of *production*, not persuasion, to the defendant once the plaintiff negates "the two most common legitimate reasons" for an employment decision: lack of qualifications or absence of a job vacancy. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 44, 97 S.Ct. 1843, 1866 n. 44, 52 L.Ed.2d 396 (1977).

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer . . . based his decision on an impermissible consideration such as race.

Furnco, 438 U.S. at 577, 98 S.Ct. at 2949-50 (citation omitted).

[1] It should be clear that the *McDonnell Douglas* method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking. It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action.

Following these principles, this court has held that where a case of discrimination is proved by direct evidence, it is incorrect to rely on a *McDonnell Douglas* rebuttal. *Lee v. Russell County Board of Education*, 684 F.2d 769, 774 (11th Cir. 1982). If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically:

> Once an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by *proving* by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor.

Id. (citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471) (emphasis added); *accord Perryman v. Johnson Prod-*

ucts Co., 698 F.2d 1138, 1143 (11th Cir. 1983); *see Ramirez v. Sloss*, 615 F.2d 163, 168 (5th Cir. 1980).

[2] The district court in this case specifically accepted as credible testimony indicating that BLS' decision-maker, Gus Westbrook, stated that he would not allow Bell into the washroom because if she were allowed in, all women would want to enter.[7] This testimony is "highly probative evidence" of illegal discrimination. *Lee*, 684 F.2d at 775. *Cf. Eastland v. TVA*, 704 F.2d 613, 626 (11th Cir. 1983) (testimony of selecting supervisor's racial bias, plus other evidence, defeated defendant's *McDonnell Douglas* rebuttal). The district court did not make any findings that Westbrook put aside his bias when he imposed the pulling and loading functions on Bell. Absent such a finding, it is impossible to conclude that BLS met its heavy burden of proving, under *Lee*, *Perryman*, and *Mt. Healthy*, that it would have reached the same decision without the presence of gender discrimination. This case must be remanded to the district court so that the court may evaluate the evidence under the *Mt. Healthy* standard.

The ultimate question in this case, the existence of discriminatory intent *vel non*, is a factual matter. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982). Bell urges us to reverse and remand this case for entry of judgment, since the district court's findings are infirm because of its erroneous view of the law *and*, in her view, "the record permits only one resolution of the factual

---

[7] Since the district court had the advantage of observing the witnesses and evaluating their credibility first-hand, its findings of fact in this regard deserve special deference. *Lincoln v. Board of Regents of the Univ. Sys.*, 697 F.2d 928, 939 (11th Cir. 1983).

issue." *Id.* at 292, 102 S.Ct. at 1792. We decline Bell's tempting invitation because we believe the district court's factual findings are inadequate to allow us to draw this conclusion.

To guide the district court, however, we emphasize those factors or reasons articulated by BLS which are *irrelevant*, as a matter of law, to the court's determination. The sole question before the district court on remand is whether Westbrook, and therefore BLS, imposed the pulling and loading tasks on Bell as a condition of the extra washman job in significant part because of her gender.[8] Mason's allegedly superior qualifications for the position have no bearing on the reasons BLS imposed the pulling and loading functions on Bell. For both logical and legal purposes, BLS abandoned its position that Mason deserved the job because of his superior qualifications when it agreed on August 5 that, notwithstanding anyone's qualifications, Bell would receive the posted vacancy.

Similarly, Westbrook's original intent, if any, simply to make official Mason's de facto occupancy of the position is irrelevant. When BLS agreed to give Bell the job on August 5—and all parties agree that this occurred—the only question for the district court to determine became: what was Westbrook's intent *at the time* he imposed the pulling and loading functions on

---

[8] It is undisputed in the trial record—as opposed to the EEOC proceedings—that Bell was offered the job, and that she left the position because Westbrook made pulling and loading a prerequisite to retaining the job.

Bell? Did sexual bias play a significant role in this decision?*

We emphasize that under *Mt. Healthy*, and our cases applying *Mt. Healthy* in the Title VII context, BLS bears not a burden of production but a burden of persuasion. Unless the district court concludes that

---

* In *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir.1980), the former Fifth Circuit held "Title VII is not violated simply because an impermissible factor plays *some* part in the employer's decision. The forbidden taint need not be the sole basis for the action to warrant relief, but it must be a significant factor." (Emphasis in original.) Subsequently, this court has emphasized that this principle is "an extremely limited one: An insignificant [illegal] factor does not warrant relief, but significant reliance on an impermissible factor is a violation." *Lee*, 684 F.2d at 775 (citing *Mt. Healthy v. Doyle*, 429 U.S. at 287, 97 S.Ct. at 576).

The difficulty of proving discriminatory intent is well-known and, as indicated *supra* at 9-10, is an integral part of the rationale for the structure of the *McDonnell Douglas* analysis. Proof of significant reliance on discrimination as a basis for an employment decision, therefore, establishes a violation of Title VII.

This court has recently acknowledged the substantial criticism of the "but for" standard of causation in disparate treatment cases. *Lincoln v. Board of Regents*, 697 F.2d at 938 n. 12. *See* Brodin, *The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective*, 82 Colum.L.Rev. 292, 311-26 (1982). We acknowledge the practical difficulties presented to a trier-of-fact required to determine what would have occurred if the discrimination had not existed and not operated as a motivating factor. *Id.* at 320-21. Since the district court did not make findings concerning the causal relationship, if any, between the bias it found to exist and the action taken, it is unclear whether this case presents a "mixed motive" situation. We therefore have no occasion to reach the question of any possible modification of the *Mt. Healthy* standard in the Title VII context.

Westbrook's sexual bias had no relation whatsoever to his employment decision, BLS must establish by a preponderance of the evidence that it would have made the same decision in the absence of the illegal factor.[10]

Our careful scrutiny of the record reveals only one possible legitimate, nondiscriminatory reason for Westbrook's imposition of the pulling and loading functions on Bell: structural changes in the washroom that may have reduced BLS's need for washmen from two to one. These changes in equipment may have meant that BLS needed only one person to "fill in" for the absent washman on occasion, and for this reason posted the "extra washman" position with the intent that the occupant of the job pull and load in addition to wash.[11]

However, the record evidence on this point is far from clear, to say the least. The district court, in order to credit BLS' explanation, must find as fact that the changes adverted to took place *prior* to July 12, 1977, the date the extra washman position was posted.[12] To

---

[10] If the district court finds that Westbrook's bias played no role in his decision, it should clearly articulate the basis for its finding. This is necessary in light of the nature of the statement the court found that Westbrook had made and the highly probative character of testimony concerning direct decision-maker bias.

[11] The arbitrator's findings that BLS combined job functions in violation of the collective bargaining agreement tends to support this view; we do not doubt that the realities of industrial life do not always conform to the precise categories of the collective bargaining agreement. However, the arbitrator also found that BLS discriminated against Bell on the basis of her sex.

[12] The most probative evidence in the record on this point, the testimony of washroom supervisor Farmer, indicates that the changes occurred *after* his retirement in September 1977. The ev-

reiterate, given the evidence of direct discrimination, BLS bears the full burden of persuasion on this point.[18] Unless the court finds that BLS established this by a preponderance of the evidence, it must enter judgment for Bell and grant appropriate relief.

In making this finding, the district court should consider, inter alia, (1) the changing factual positions BLS has taken in the arbitration, EEOC, and judicial proceedings; (2) the evidence of the distribution of BLS' work force by sex among the various jobs in the plant, *see McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. at 1825; (3) BLS' breach of its collective bargaining agreement as it may or may not reflect on its motivation, *see Loeb v. Textron*, 600 F.2d at 1012 n. 6 (the more questionable the employer's reason, the more likely the reason is merely a pretext); and (4) the failure, if any, of BLS to follow objective standards in making its employment decision in this case, *Harris v. Birmingham Board of Education*, 712 F.2d 1377 at 1382, 1384 (11th Cir. Aug. 22, 1983); *Watson v. National Linen Service*, 686 F.2d 877, 881 (11th Cir.1982).

The judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

---

idence, however, was disputed, the parties did not focus on this question clearly, and the district court made no findings in this regard.

[18] This seems particularly appropriate in this case since BLS clearly has greater access to proof of these facts than does Bell.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
PETITIONER,

v.

NORA C. BELL, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX C

C1

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7489

NORA C. BELL,
Plaintiff-Appellant,

versus

BIRMINGHAM LINEN SERVICE, ETC.,
Defendant-Appellee.

Appeal from the United States District Court for the

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 30, 11 Cir., 1983, __ F.2d __).
(December 05, 1983)

Before TJOFLAT, HILL, and JOHNSON, Circuit Judges.

PER CURIAM:

(XX) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule

26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
PETITIONER,

v.

NORA C. BELL, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

NORA C. BELL, *Plaintiff,*	)	
v.	)	
	)	CIVIL ACTION NO.: CV80-PT-0237-S
BIRMINGHAM LINEN SERVICE, *Defendant.*	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This supplements the findings and conclusions stated on the record at the conclusion of the case.

The court finds that plaintiff has established a *prima facie* case as to the promotion claim (or constructive demotion as the case may be) by establishing that there was a vacancy, that she applied for it, that she was capable of being qualified for the job with reasonable training, and that the job was later filled by a male employee. The court further finds, in support of plaintiff's *prima facie* case, that it was not necessary for a person to do "pulling and loading" to train for the job of "washman" and that performing the job of pulling and/or loading had not previously been a crite-

rion for obtaining the job of washman. In the absence of a sufficient credible articulated reason to the contrary, the court would find that the job of pulling and/or loading was placed on plaintiff deliberately to discourage her from taking the job of "extra washman" or "washman trainee." This is supported by the fact the job, as originally advertised, was not indicated to require pulling and loading, while the second advertisement did make such requirement,

Thus the burden was shifted to the defendant to articulate a non-discriminatory reason for its refusal to place plaintiff in the position of "washman" or its placing increased burdens on the job after plaintiff applied for it. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. ____ (1981).

The court finds that defendant articulated credible reasons for not placing plaintiff in the position as follows:

> That defendant's overhead loading system and self-dumping washers had, in 1977, reduced the requirements of washmen from two to one. That Wardell Mason had intermittently performed the tasks of a washman for several years and that, when he performed the job, he was paid as a washman. This necessitated his supervisor having to repeatedly note on his time card that he was to be paid at a washman's rate. It was in order to avoid this necessity and in order to clear up any questions about Mason's true position and title, that defendant decided to post for the job of "extra" washman. Defendant clearly intended that Mason apply for and receive this job, but this intention was based on his experience and qualifications, not his sex. Further,

that all other employees who had served as washmen had previously learned the position by working in the washroom and observing the job being performed.

Thus the presumption established by the *prima facie* case is rebutted and the burden of persuasion remained with the plaintiff to satisfy the court by a preponderance of the evidence that defendant's treatment of plaintiff was motivated by sex discrimination, *Burdine, supra*, and that she has been the victim of intentional discrimination. To meet this burden she must demonstrate to the court that the proffered reason[1] was not the true reason for the employment decision.

Plaintiff may do this by persuading the court that a discriminatory reason more likely motivated the defendant or indirectly by showing that the defendant's proffered explanation is unworthy of credence. In determining whether plaintiff has met her ultimate burden by establishing pretext, the court should consider not only additional evidence offered by plaintiff, but the court should also consider plaintiff's initial evidence, the credibility of defendant's evidence, and evidence developed by plaintiff on cross-examination. *Burdine, supra.*

Plaintiff argues that defendant's articulated reasons were pretextual and states the following in support of her argument:

1. The Equal Employment Opportunity Commission's determination found reasonable cause for sex

---

[1] That is that Mason was already qualified for the job and had effectively been filling it already.

discrimination [See *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972); allowing the Equal Employment Opportunity Commission report as expert testimony];

2. The Union arbitration decision which also found in favor of the plaintiff on her claim of sex discrimination;

3. Testimony by the plaintiff and the Union Steward, that Gus Westbrook made the statement "that he would not put Nora Bell into the washroom because if he did every woman in the plant would want to go into the washroom." (The demeanor of Gus Westbrook on the stand should be taken into consideration in determining whether his denial is credible);

4. Testimony that no female employee has ever worked in the washroom in any of its jobs since the 1950's;

5. All of the highest paid jobs in the defendant plant are held by male employees. The highest paid job in the plant is the washer's job and is a male job;

6. Despite the defendant's effort to show that plaintiff had to take a puller or loader job and would in fact be paid at that rate before she could accept the washer's job, the backpay by the Union was based on the washer's rate of pay and not the puller or loader job;

7. Overwhelming evidence showed that the washer's job was not a job which was too difficult for a woman to perform;

8. The evidence was overwhelming that nothing learned in the puller or loader job was usable in the washer's job. The only reason for the puller or loader job ever being mentioned in the case was because all washers had come from the puller or loader jobs previous to Nora Bell's bidding on the job;

9. The evidence was overwhelming that the washer's job was learned by observing the washer do the job. This was done when the work that the employee was doing on his job was finished and he had a few minutes to observe the washmen;

10. Wardell Mason testified that it took him approximately fifteen minutes of observation a day for five days to learn the washman's job. He learned the job while free from doing his other job. He stated that the only difference, in his opinion, between his learning the job and Nora Bell learning the job while performing her regular job would have been that she would have had to walk into the washroom to observe the washers. Also, Mason testified the washer's job doesn't include pulling and loading unless someone is absent.

Notwithstanding the findings of EEOC and the arbitration decision, it is the responsibility of this court to make its own findings and reach its own conclusion.[3]

While the evidence was disputed as to whether Westbrook made the statement, "that he would not put Nora Bell into the washroom because if he did every woman in the plant would want to go into the washroom," the court finds that this statement or a

---

[3] The court has considered the EEOC findings.

similar statement in substance was made by Westbrook. The court also finds that no female employee has been employed in the washroom in over thirty years; that it was not necessary to learn a puller and/or loader job to learn the washman job; that previous washers had previously been pullers or loaders; that the washman job had generally been learned by employees in the washroom observing the job; and that plaintiff could have learned to be a washman without learning to pull and load.

Notwithstanding the foregoing findings, the court must still determine if the plaintiff has established by a preponderance of the evidence that she has been the victim of intentional discrimination.

The Fifth Circuit has recently discussed the criteria of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in the context of sex discrimination. In *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir. 1981),[3] the court said:

> "Accordingly, the precise issue is whether Rohde was fired under the impetus of discrimination or for a valid reason; it is whether she was indeed discriminated against."

649 F.2d at 323.

The court goes on to say that, once a *prima facie* case has been established, the burden of rebuttal on the employer requires proof that the employment decision would have been made *anyway* in the absence of dis-

---

[3] A post-*Burdine* case.

crimination and that it is insufficient to show that sex was not the *only* issue for the decision.

The court thus concludes that the real issue in this case, notwithstanding any comments made by Westbrook or the findings of the EEOC or the arbitration decision, is whether defendant's deliberate effort to place Mason in the position was motivated by matters relating to sex or whether this effort was motivated by Mason's prior experience and ability to perform the job without further training.

The court finds and concludes that the initial reason for posting the job was to add a proper title to Mason's *de facto* position of "extra" washman. Although this procedure ran afoul of the collective bargaining agreement, such a conflict does not also reflect discrimination.

The court finds and concludes, notwithstanding insubstantial testimony to the contrary that the job was posted on the second occasion after the arbitration decision. If the plaintiff saw it, she may have elected not to apply because of the added clause pertaining to pulling and loading or she may have decided to rely on her charge of discrimination. The adding of pulling and loading function with the second posting was consistent with defendant's original intent that the job be for that of an "extra" washman and that such "extra" washman perform other duties.[4] The fact that this type posting might still run afoul of the collective bargaining agreement does not make it discriminatory.

---

[4] The evidence was that Mason presently does pulling and loading.

The court concludes that the intent behind the whole procedure was to leave Mason in his same position, but to change his job title. The applications of both plaintiff and John Oliver (a male) complicated the situation because of their seniority. This complication relates, however, to the collective bargaining agreement and not discrimination. It could well be that the arbitration decision was not satisfied when the new posting added the pulling and loading requirements. That is not before the court.

The court ultimately finds and concludes that:

(1) Plaintiff proved a *prima facie* case of discrimination;

(2) Defendant rebutted the presumption created by plaintiff's *prima facie* case by articulating legitimate, nondiscriminatory reasons for their failure to promote plaintiff;

(3) That the plaintiff has not demonstrated that the reasons given were not the true reasons for the employment decision; and,

(4) That plaintiff has not persuaded the court, by a preponderance of the evidence, that she has been the victim of intentional discrimination.

In accordance with the foregoing findings and conclusions, a separate judgment will be entered in favor of defendant and dismissing plaintiff's complaint.

DONE and ORDERED this 30th day of September, 1981.

s/s Robert D. Propst

ROBERT D. PROPST
UNITED STATES DISTRICT JUDGE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
PETITIONER,

v.

NORA C. BELL, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX E

CONCLUSION

THE COURT: All right. I will make these comments as some present findings of fact and conclusions which I will supplement by written order and give the attorneys some direction as to the problem that the Court experiences with one particular phase of the case.

First of all, I will comment for the record that as I recall, all of the witnesses who testified were of the same race as the plaintiff, except for Mr. Farmer, Mr. Westbrook and Mr. Jones. Is that correct?

MR. MARTIN: Yes, sir.

THE COURT: I think it's apparent, of course, what sex the witnesses are that have testified.

With regard to the charges of retaliatory or harrassment or intimidation, the Court does not find any substantial evidence and certainly does not find from a preponderance of the evidence that there is any—or the Court is not satisfied from a preponderance of the evidence that there is any basis for that claim, or that certainly that there is not any basis on which to render a judgment based on this claim.

The Court bases this, to some extent, on the testimony of Mr. Beverly and the testimony of Mrs. Alfred. And in any event, even taking Mrs. Bell's testimony at its face value in that regard, the Court doesn't find any substantial evidence of any intimidation or harrassment.

The Court further finds that the job for washer trainee, with the designation that they would be expected to do pulling and loading, was posted in April of 1978. And, the Court bases that finding on the fact that

that was testified to by Mr. Westbrook, Mrs. Robinson, Mrs. Alfred and Mr. Mason. And only the plaintiff and her sister gave any testimony to the contrary.

The Court further finds that prior to the posting in July of 1977 of the job that was referred to as extra washman, that Mr. Westbrook, who was in a managerial position, had posted that position with the desire and the expectation that the job would be awarded to Mr. Mason who was a male employee. And that at the time the job was awarded to Mrs. Bell, after July of 1977, that it was done reluctantly because of the fact that she had seniority.

Now, that's at the point where the Court has difficulty and as what quite often happens, the Court is put in the position of not necessarily winnowing wheat and chaff, but creating wheat out of chaff or whatever the situation might be. These are not findings and these are not conclusions. So, I will just go off the record at this point and I will say this on the record, that the Court expects to supplement what has been stated on the record with regard to findings and conclusions by further written findings and conclusions. At this point, I will go off the record.

(Court was adjourned at 2:48 p.m.)

NO. 83-1447

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
Petitioner,

v.

NORA C. BELL,
Respondent.

Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

ROBERT L. WIGGINS, JR.
716 Brown Marx Building
2000 1st Avenue North
Birmingham, Alabama 35203
(205) 252-4065

Counsel for Respondent.

TABLE OF CONTENTS

Page

TABLE OF CASES AND STATUTES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. The Decision Below Does Not Place The Burden Of Persuasion On The Defendant Until After A Finding Of Direct Evidence Of Discriminatory Intent Is Made By The Factfinder 6

II. The Decision Below Did Not Set Aside Factual Findings Of The District Court 14

TABLE OF AUTHORITIES

Cases: *Page*

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, L.Ed.2d 957 (1978) 6

Lee v. Russell County Bd. of Ed., 684 F.2d 769, 774 (11th Cir. 1982) 13

League of United Latin American Citizens v. City of Salinas Fire Dept., 654 F.2d 557, 558 (9th Cir. 1981) 13

McCormick v. Attalla County Board of Ed., 541 F.2d 1094, 1095 (5th Cir. 1976) 13

McDonnell Douglas v. Green, 411 U.S. 792, 802 n.13, 93 S.Ct. 1817, 1824 n.13, 36 L.Ed.2d 668 (1973) 6

Milton v. Weinberger, 696 F.2d 94, 98-99 (D.C. Cir. 1982) 13

Muntin v. State of California Parks and Recreation Dept., 671 F.2d 360, 362-363 (9th Cir. 1982) 13

Nanty v. Burrows Co., 660 F.2d 1327, 1333 (9th Cir. 1981) 13

Pullman Standard v. Swint, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982) 14

Smith v. Secretary of Navy, 659 F.2d 1113, 1120 & n.58 (D.C. Cir. 1981) 13

Teamsters v. United States, 431 U.S. 324, 357-359, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977) 6, 9

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, n.6 101 S.Ct. 1089, 1094 n.6, 67 L.Ed.2d 207 (1981) 6

United States Postal Service Board v. Aikens, ___ U.S. ___, 31 FEP Cases 609, 611 (1983) 9

TABLE OF AUTHORITIES – (Continued)

Cases: *Page*

Walker v. Ford Motor Co., 684 F.2d 1355, 1362 n.9 (11th Cir. 1982) 13

Wang v. Hoffman, 694 F.2d 1146, 1148 n.3 (9th Cir. 1982) 13

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000-e *et seq.* ..... *passim*

NO. 83-1447

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
Petitioner,

v.

NORA C. BELL,
Respondent.

Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

STATEMENT OF THE CASE

The petition does not accurately or completely describe the facts or the proceedings involved in the current case. In order to properly understand the posture of the current case, a restatement of the facts is necessary.

FACTS

At the very moment that she was rejected for promotion, the plaintiff was told by the defendant's manager that he would not put her in the Washroom because if he did "every woman in the plant would want to go into the Wash-

room". (App. D.6 and B.5.) The district court found this as a fact and the Court of Appeals concurred. (App. D.6 and B.5.) The Arbitrator and the E.E.O.C. made similar findings on the basis of substantially the same evidence. (Pl. Ex. 6 & 10). The Petition to this Court does not deny that this statement was made to the plaintiff at the moment she was rejected for the promotion. It prefers, instead, to characterize its comment as a mere "anecdote". The statement to the plaintiff, of course, was not merely an anecdote but constituted direct evidence of intent to sexually discriminate. It cannot be lightly brushed aside by labeling it as "anecdotal evidence".

The plaintiff, Nora Bell, has been employed by the defendant for 23 years. (Tr. 137). During that period she has been confined to the predominantly female jobs and departments. The defendant has not had a female employee assigned to the higher paying Washroom Department "in over thirty years". (R. 91; Tr. 8, 33, 52). The defendant's departments and jobs within departments are predominantly segregated along sexual lines with women having the lower paying less desirable jobs and departments. (Pl. Ex. 12, 13, 14, 16).

In March, 1977 a vacancy was created in the all male Washroom Department by the retirement of Richard Day. (Tr. 66, 71, 234). The vacancy was in the Washman job classification, which was the highest paying hourly job in the plant. The defendant assigned an incumbent male in the department, Waddell Mason, to the vacancy without posting it for bid even though the collective bargaining agreement required that it be posted and bid according to plant seniority. (Tr. 236, 48, 328; PX 2, pp. 19-20).

It was not until July 12, 1977 that the defendant finally posted the Washman vacancy for bid. (Pl. Ex. 7). Three male incumbents from the department bid on the job in

addition to the plaintiff before the posting was removed on July 18, 1977. (Pl. Ex. 7; Pl. Ex. 13; Tr. 347-348). From that date until Friday, August 5, 1977, the defendant continued to have Waddell Mason perform the Washman job even though the plaintiff was the senior bidder. (Tr. 49, 236, 328, 348-349, 356; Pl. Ex. 13).

The defendant awarded the Washman vacancy to Waddell Mason without announcing that fact to anyone. (Tr. 328, 348-349, 356, 147-148). After several weeks passed without any announcement of the award, the plaintiff went to her Union representative. (Tr. 147-148). The Union representative and the plaintiff met with the Company on Friday, August 5, 1977 and complained that the plaintiff should have been awarded the job because she had the greatest seniority. (Tr. 49-51, 142, 328). The Company relented and agreed to put the plaintiff on the Washman job the following Monday. (Tr. 49-51, 328). As the district court found, however, the movement of the plaintiff into the job of Washman "was done reluctantly because of the fact that she had seniority". (Tr. 455). The district court also found that the job vacancy had been posted with the "desire and the expectation that the job would be awarded to Mr. Mason who was a male employee". (Tr. 454-455; R. 92-93).

On Monday, August 8, 1977, the plaintiff was allowed to suit - up and enter the Washroom. When she arrived, however, she was told that she was not allowed to do the job of Washman but could do the Puller-Loader job, which was a lesser paying, more strenuous and less desirable job. (Tr. 142-143, 145-146, 195, 202-203, 70-71, 93, 99, 234, 288, 224, 277-278). The male bidder (Waddell Mason), who had been performing the job since it became vacant in March, came up to the plaintiff and told her that pulling and loading was not a part of the Washman job and that

she should be doing only Washman duties. (Tr. 143, 100, 70-75). The plaintiff then told Mr. Westbrook, the Production Manager, that she did not bid on Puller and Loader and was not supposed to do the tasks associated with the Puller Loader job. (Tr. 142-143, 146, 74, 288). Mr. Westbrook responded that if she did not want a Puller-Loader job then she would just have to see Mr. Jones, who was the Plant Manager. (Tr. 146-147, 199-200). She talked with Mr. Jones and he told her that she could only have the Puller-Loader job because Waddell Mason was taking the Washman job. (Tr. 146-147). He also told her to return to Mr. Westbrook and discuss it with him. (Tr. 146-147, 142-143). She returned to Mr. Westbrook[1] and was told, according to the district court's findings, "that he would not put Nora Bell into the Washroom because if he did every woman in the plant would want to go into the washroom".[2] She was then returned to her old job outside the Washroom. (Tr. 146-147, 199-200).

---

[1]The evidence showed that Westbrook had stated that he would not have any women in the washroom "several times". (Tr. 143-144). Specifically, he was identified as stating this at the August 4, 1977 meeting with the plaintiff and the Union Steward and the August 8, 1977 meeting with the plaintiff. (Tr. 140-141, 143-144, 188, 209-210; PX 10, p. 2).

[2]The district court recognized that "the evidence was disputed" on this point and that the "demeanor of Gus Westbrook on the stand should be taken into consideration in determining whether his denial is credible". (R. 90-91). After evaluating the evidence, it found that Westbrook made "this statement or a similar statement in substance". The plaintiff and the Union Steward, Georgia Robinson, testified that the statement was made in their presence. (Tr. 143-144, 209-210). A reading of the testimony of Jones and Westbrook, shows that Jones never denied or affirmed that the statement was made and that Westbrook never directly denied that the statement was made. During the arbitration Westbrook was quoted as stating that "'if he placed Nora Bell in the washman's job, every woman in the plant would want to enter the washroom, and there was no way he would permit this to happen'". (Pl.Ex. 10, p. 2). The arbitrator concluded that the plaintiff was denied the Washman's job "because she was of the female sex". (Pl.Ex. 10, p. 5). The E.E.O.C. also found that Westbrook "stated that the selection of the [plaintiff] would open the way for females to be assigned in the Washroom". (Pl.Ex. 6, p. 1).

It was not Waddell Mason's training or experience as a Washman which caused the defendant to so vigorously push his candidacy and selection for the Washman vacancy. The evidence was undisputed that it only took one week to learn the Washman's job. (Tr. 410). The job could be learned from brief periods of watching someone else perform the job. (Tr. 407-408, 410). Waddell Mason, in fact, trained himself. (Tr. 407). The lack of experience in the Washroom was no significant impediment since the other principal job, the Puller-Loader position, was admitted to be so simple that it could be learned in 5 minutes. (Tr. 343-353). More importantly, the defendant admitted that the Puller-Loader job did not provide any training for the higher paying Washman job. (Tr. 353, 240, 411, 407-408). The district court specifically found that "it was not necessary for a person to do 'pulling and loading' to train for the job of washman' and that performing the job of pulling and/or loading had not previously been a criterion for obtaining the job of washman". (R. 88). In regard to the plaintiff herself, the district court found that the plaintiff "was capable of being qualified for the job with reasonable training" and that she "could have learned to be a washman without learning to pull and load". (R. 88, 91).

The defendant admitted that it has difficulty getting bids on the Puller-Loader job because it is "strenuous". (Tr. 277-278). It also pays less than the Washman. The plaintiff, just as all the other employees, never bid on the Puller-Loader job for these reasons. (Tr. 277-278). Since the Puller-Loader job served no training function for the Washman job, and the latter job could be learned in one week through simple observation, there was no reason for the defendant to insist on the plaintiff being a Puller-Loader other than discouraging her from staying in the

Washroom to receive training for the Washman job.[3] On the basis of the evidence, the "pulling and loading" prerequisite placed on the April, 1978 bid posting was nothing more than a continuing attempt to discourage the plaintiff from pursuing entrance to the Washroom.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Place The Burden Of Persuasion On The Defendant Until After A Finding Of Direct Evidence Of Discriminatory Intent Is Made By The Factfinder

The Petition grossly mischaracterizes the decision below. The Eleventh Circuit has not changed the order and allocation of the burden of proof which has been established by this Court for cases involving indirect or circumstantial evidence of discrimination. It has done exactly the opposite. It followed the repeated admonition of this Court that the *McDonnell-Douglas - Burdine* order and allocation of the burden of proof is not applicable to all factual situations or all Title VII cases. *McDonnell Douglas v. Green,* 411 U.S. 792, 802 n.13, 93 S.Ct. 1817, 1824 n.13, 36 L.Ed.2d 668 (1973); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, n.6 101 S.Ct. 1089, 1094 n.6, 67, L.Ed.2d 207 (1981); *Teamsters v. United States,* 431 U.S. 324, 357-359, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). The decision below specifically states that "[t]he Supreme Court, and

[3]It was in recognition of this fact that the district court found that "the burden was shifted to the defendant to articulate a non-discriminatory reason for its refusal to place plaintiff in the position of 'washman' or its placing increased burdens on the job after plaintiff applied for it". (R. 88). As argued more fully hereinbelow, the district court's order and allocation of proof on this issue was erroneous as a matter of fact and law because it allowed overt sexual discrimination to be rebutted by a mere "articulation" standard that was inapplicable to the case at bar.

this court, have stressed time and again that the four - part *McDonnell Douglas* test for establishing a prima facie case of disparate treatment is not intended to be a Procrustean bed within which all disparate treatment cases must be forced to lie". 715 F.2d at 1556 (App. B. 11).

The Court of Appeals correctly concluded that this is a case in which the *McDonnell Douglas* order and allocation of proof is inapplicable. The decision below states:

> It should be clear that the *McDonnell Douglas* method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking. It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action. 615 F.2d at 1556-1557. (App. B. 13).

This holding is fully supported by both common sense and prior precedent. In a case involving direct evidence of discrimination, the application of the *McDonnell Douglas* formula produces an irrational linguistic inquiry. After the employer has been found as a fact to have stated that he rejected the plaintiff because she was a woman, the petitioner herein still wants the court to continue to grapple with the *McDonnell Douglas* formula and the circumstantial evidence of intent for which that formula was designed. The result is a logical absurdity. It makes no sense to continue to inquire into the employer's intent or motivation *after* it has just told you what their intent and motivation was. It is tantamount to asking whether a person *intended to intend* to discriminate. When an employer is found as a fact to have told the plaintiff that she was not wanted because "every woman in the plant would want to go into the

Washroom", as was done herein, it is irrational to continue to inquire into motive or intent. The motive and intent are an explicit part of the finding. At that point, the *McDonnell Douglas* mechanism becomes a superfluous inquiry.

The petitioner does not concern itself with the logical infirmities of the position it takes. It offers no explanation for why an employer should be allowed to hide behind the *McDonnell Douglas* mechanism in a case in which it has been found to have stated its intent to exclude women from the best - paying department in its plant. Instead, the petitioner is content to merely chant the *McDonnell Douglas* formula as if it were a magical incantation which frees all employers from answering for even their admitted sexual biases. When the matter is analyzed separately from the narrow pidgeonholes of *McDonnell Douglas* and its progeny, the illogic of the petitioner's argument becomes readily apparent.

No employer who has been found to have explicitly stated its intent to exclude the plaintiff and other women from an all - male department should be given the opportunity to escape liability by merely "articulating" other reasons for its conduct. The "articulation" standard of rebuttal was crafted in *Burdine, supra,* as a response to the indirect nature of the prima facie case allowed by *McDonnell Douglas.* Because the prima facie case did not involve any direct evidence of intent or motivation, the rebuttal phase of the case did not require the defendant to "prove" that it was actually motivated by the reasons it articulated for its treatment of the plaintiff. The *Burdine* "articulation" standard specifically states that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons". *Burdine, supra* at 254. As this Court has said several times, the *McDonnell Douglas - Burdine* analysis is merely a means of progressively sharp-

ening the inquiry so that the factfinder eventually is in a position to decide whether there is sufficient *indirect* or circumstantial evidence to conclude that the employer [is] treating 'some people less favorably than others because of their race, color, religion, sex or national origin' ". *United States Postal Service Board v. Aikens*, ... U.S. ....., 31 FEP Cases 609, 611 (1983). The "articulation" standard in *Burdine* is merely one phase of the mechanism for progressively sharpening that inquiry when there is no direct evidence and the court is forced to probe the "sensitive and difficult" question of intent through purely circumstantial evidence.

The Court of Appeals, speaking through Judge Tjoflat, correctly recognized the illogic of progressively sharpening an inquiry into circumstantial evidence in a case in which the district court has found as a fact that the employer stated its intent to exclude women at the very moment it rejected the plaintiff for promotion. The petitioner, on the other hand, refuses to recognize the inherent limitations of the *McDonnell Douglas - Burdine* approach. The petitioner argues that the latter approach should apply to *all* facts and circumstances in Title VII cases and that an employer should never have to do more than "articulate" its position in the lawsuit. The impossibility of such a position is readily apparent. Consider the example used by this Court in *Teamsters v. United States*, 431 U.S. 324, 265-66, 97 S.Ct. 1843, 1870, 52 L.Ed.2d 356 (1977), in which the employer "announce[d] his policy of discrimination by a sign reading "Whites Only" on the hiring - office door". *Id.* at 365. Would the plaintiff be forced to prove a *McDonnell Douglas* prima facie case in circumstances of this sort? More importantly, would the employer be allowed to rebut this evidence by merely "articulating" a reason for its action without proving that it was actually motivated by

such reason in its treatment of the plaintiff? The Civil Rights Act would obviously be a farce and a deception if such a result were to become the law of the land. The petitioner offers no argument or explanation which would even remotely support such an approach to the enforcement of Title VII. This Court implicitly rejected it when it stated in *Teamsters v. United States, supra* at 358, that "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act". In a case in which the plaintiff has proven to the satisfaction of the factfinder that the employer announced its policy of discrimination at the very moment that it rejected the plaintiff for promotion, the plaintiff has done more than create an "inference" of discrimination and the entire character of the proceeding shifts away from the question of *violation* of the Act and toward the question of *remedies* for that violation.

The petitioner's argument for the "articulation" standard of *Burdine* is grounded in a refusal to recognize the distinction between the question of what is a *violation* of the Act and the question of what is an appropriate *remedy* for the violation. Once an employer is found to have announced his policy of discrimination at the very moment that the contested employment decision was made, the entire question of whether the Act was violated falls away from the case. The Act is *necessarily* violated in such a case and the only question that remains is one of *remedy*, i.e. should the plaintiff be awarded instatement into the position denied and back-pay. In the remedy phase the employer is permitted by the decision below to prove that the

plaintiff would not have been promoted even in the absence of the announced policy of discrimination, thereby avoiding instatement and back-pay as remedies. In no event, however, should the employer be allowed to have his announced policy of discrimination declared not to be a violation of the Act. Unless the petitioner's position is rejected, that is exactly what this Court will be allowing. Employers will be permitted to avoid a finding that Title VII is violated even where they have been found to have explicitly announced their policy of discrimination. Not only that, but they will be permitted to do so by the very slight "articulation" burden of *Burdine*.

The Court of Appeals was correct in holding that when an employer announces his policy of discrimination explicitly, the ultimate issue of intent to discriminate is proven directly without need of the *McDonnell Douglas* minuet. It was also correct in holding that the employer must *prove* that it would not have selected the plaintiff even in the absence of the announced policy of discrimination in order to avoid back-pay and instatement as remedies. It would be nothing short of bizarre for the Court to have held that the "articulation" burden applies even after an announced policy of discrimination has been found by the district court.

The petitioner's alarm with the implications of the decision below does not survive analysis. First, it argues that the Eleventh Circuit would permit a generalized policy of discrimination to shift the burden of persuasion to the employer. Pet., p. 9. There is nothing in the decision below which supports this notion. The plaintiff proved that the policy of discrimination was announced to the plaintiff as the reason for the exclusion from the Washroom at the very moment that the exclusion took place. 715 F.2d at 1553. (App. B.6.). This is not a case in which the employer announced a policy of discrimination at a time and place re-

mote from the particular employment decision that is the subject of the lawsuit. The announced policy of discrimination was specific and addressed directly to the plaintiff in the midst of her rejection for the promotion that is the subject of this particular lawsuit.[4] For these reasons, the petitioner's argument is rather far - fetched when it states that "[t]he focus of the evidence . . . will no longer be on the alleged discriminatory incident and the motivation of the employer".

Secondly, the petitioner's argument on the difficulty and "uncertainty" in applying the burden of proof imposed in the decision below is also unsupported. Pleading and proving defenses in the alternative is certainly nothing new, especially in non-jury cases. Moreover, this Court in *Burdine* recognized that "although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful". *Burdine, supra* at 258. Under the decision below, the employer still has that same incentive, but also has an added duty of persuasion in cases involving direct evidence of intent or an announced policy of discrimination. Employers and their attorneys are not so unsophisticated that they cannot identify the relatively few cases in which direct evidence or an announced policy is present and adjust their defense accordingly so that proof is offered on the issue of whether the plaintiff would have been promoted in the absence of the announced policy.

Thirdly, the petitioner is in error to suggest that there is a split among the Circuits and in the Eleventh Circuit on

[4]The petitioner's argument seeks to confuse the current case with those other cases in which direct evidence was presented merely as an "anecdote" collateral to the main factual context of the case. This is not such a case. The announced policy of discrimination was not a mere anecdote unconnected to the main factual events in the case. Rather, the announced policy was the centerpiece of the entire set of factual events on which liability is predicated.

the burden of persuasion applicable in cases involving direct evidence or an announced policy of discrimination. The cases on which it relies involved circumstances where the plaintiff followed the *McDonnell Douglas - Burdine* method of proof and presented direct evidence of bias merely as an anecdotal part of the evidence of pretext. Anecdotes involving sexual bias which are *unconnected* to the employment decision at issue are an appropriate source of evidence on the issue of pretext under *McDonnell Douglas*. Such unconnected anecdotes are indirect or circumstantial evidence which are, of course, exactly what *McDonnell Douglas* was intended to focus on. Those cases cited by the petitioner are not in conflict with the decision below in this regard. The petitioner's argument, however, fails to come to grips with the fact that the current case does not involve a mere unconnected anecdote but rather involves an announced policy of discrimination applied directly to the plaintiff. When this distinction is considered, there is no conflict among the Circuits. The Circuits that have considered the issues involved in the decision below are consistent with it. See e.g., *Muntin v. State of California Parks and Recreation Dept.*, 671 F.2d 360, 362-363 (9th Cir. 1982); *Milton v. Weinberger*, 696 F.2d 94, 98-99 (D.C. Cir. 1982); *Wang v. Hoffman*, 694 F.2d 1146, 1148 n.3 (9th Cir. 1982); *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 & n.58 (D.C. Cir. 1981); *League of United Latin American Citizens v. City of Salinas Fire Dept.*, 654 F.2d 557, 558 (9th Cir. 1981); *Nanty v. Burrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981). See also, *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 n.9 (11th Cir. 1982) (Cites *City of Salinas, supra* with approval.). See also, *Lee v. Russell County Bd. of Ed.*, 684 F.2d 769, 774 (11th Cir. 1982); *McCormick v. Attalla County Board of Ed.*, 541 F.2d 1094, 1095 (5th Cir. 1976).

For all the foregoing reasons, the Court of Appeals was correct in holding that an announced policy of discrimination cannot be rebutted by the "articulation" standard of the *McDonnell Douglas - Burdine* line of cases.

II. The Decision Below Did Not Set Aside Factual Findings Of The District Court

The petitioner's entire argument on this point mischaracterizes the ruling of the district court and the Court of Appeals. There is no truth whatsoever to the assertion that the Court of Appeals set aside any of the factual findings of the district court. A simple reading of the decision below dispels the petitioner's entire argument. Circuit Judge Tjoflat specifically stated that the Court was "hampered in our exposition of the events forming the background of this dispute because the district court failed to make findings concerning many of the basic, subsidiary facts which are unclear or disputed in the record". 715 F.2d at 1552 (App. B.4). Despite the infirmity of the findings in the district court, the Court of Appeals *did not* enter its own findings of fact. Instead, it remanded to the district court. In this regard, it stated the following:

> The ultimate question in this case, the existence of discriminatory intent *vel non*, is a factual matter. See, *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982). Bell urges us to reverse and remand this case for entry of judgment, since the district court's findings are infirm because of its erroneous view of the law and, in her view, 'the record permits only one resolution of the factual issue'. *Id.* at 292, 102 S.Ct. at 1792. We decline Bell's tempting invitation because we believe the district court's factual findings are inadequate to allow us to draw this conclusion.

The Court of Appeals reversed the district court because

it applied an erroneous legal standard to the facts of this case. The decision in *Pullman Standard* says that the case should be remanded for entry of findings by the district court under the correct legal standard. That is exactly what was done in the decision below. There is no reason to grant the Petition in such circumstances. The petitioner's argument on the effect of this Court's ruling in *Pullman Standard v. Swint, supra,* is so broad that if it were adopted it would make it virtually impossible for the Court of Appeals to correct even purely legal errors. The decision in *Pullman Standard* clearly did not go as far as the petitioner now argues.[5]

CONCLUSION

This case is not one that should be reviewed by the Court. The Court of Appeals painstakingly followed the recent authoritative precedent laid down by this Court in *Burdine, Aikens* and *Swint.* There is no conflict among the Circuits in the application of these authorities. Neither is there any aspect of the application of these authorities in the circumstances of this case which merits any further attention by this Court.

Respectfully submitted,

Robert L. Wiggins, Jr.
716 Brown-Marx Tower
2000 1st Avenue North
Birmingham, Alabama 35203
(205) 252-4065

[5]Moreover, the petitioner is now doing what it accuses the Court of Appeals of having done. The effect of it is to reargue the facts to this Court and to ignore the findings of the district court. The bulk of the facts asserted in its Petition are not supported by the district court's findings.